

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF WEST VIRGINIA  
AT CHARLESTON

DANIEL F. FITZGIBBON, JR.,

Plaintiff

v.

Civil Action No.: 2:02-1288

EICO, INC., SPORT SUPPLY GROUP,  
INC., d/b/a Athletic Connection,  
COAL-MAC, INC., ARCH OF WEST  
VIRGINIA, a Division of Apogee  
Coal Co., ALEX ENERGY, INC.,  
PEERLESS EAGLE COAL CO., INDEPENDENCE  
COAL CO., INC., d/b/a Black Castle  
Mining Co., BANDMILL COAL CORPORATION,  
HIGHLAND MINING COMPANY,

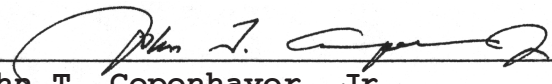
Defendants

MEMORANDUM OPINION AND ORDER

This matter is before the court on the motion of plaintiff, filed July 21, 2005, to strike the declaration of John Bussey or, in the alternative, seeking an order prohibiting defendants from relying on the declaration at the Markman hearing. Inasmuch as defendants did not offer the Bussey declaration at the Markman hearing or otherwise rely on the declaration for purposes of construction of the claim terms, it is hereby ORDERED that plaintiff's motion be, and it hereby is, denied without prejudice.

The Clerk is directed to forward copies of this written opinion and order to all counsel of record.

DATED: August 10, 2005

  
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John T. Copenhaver, Jr.  
United States District Judge